IN THE SUPREME COURT

Appeal from the Court of Appeals
Judges Kirsten Frank Kelly, Douglas B. Shapiro, and Amy Ronayne Krause

---

THE SERVICE SOURCE, INC. and THE SERVICE SOURCE FRANCHISE, LLC,

Plaintiffs-Appellees,

Docket No. 147860

v.

DHL EXPRESS (USA), INC.,

ORAL ARGUMENT REQUESTED

Defendant-Appellant.

REPLY BRIEF ON APPEAL - APPELLANT DHL EXPRESS (USA), INC.

Attorneys for Defendant-Appellant

Christopher S. Ruhland (pro hac vice)
Andrew S. Wong (pro hac vice)
Amy L. Rudd (pro hac vice)
Dechert LLP
633 West 5th Street, 37th Floor
Los Angeles, CA 90071
Tel: (213) 808-5700

Noreen L. Slank (P31964)
Collins, Einhorn, Farrell P.C.
4000 Town Center, Suite 909
Southfield, MI 48075
Tel: (248) 355-4141

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

I. Introduction

Every relevant argument in Plaintiffs' brief is new. These new arguments are inconsistent with what Plaintiffs told the lower courts and this Court throughout this lawsuit and are wrong as a matter of law. The arguments also are inconsistent with the trial and appellate record. Plaintiffs write as if they have a clean slate. But the only thing that changed in this case after the Court granted leave to appeal is that Plaintiffs hired a new lawyer. That is not a legitimate reason to make new arguments or revive arguments Plaintiffs' other lawyers waived.

Plaintiffs' brief is mostly a third attempt to convince the Court not to decide the merits of this case. Plaintiffs intentionally ignore Michigan law – including 24 Michigan cases they cited in their opposition to DHL's application for leave to appeal – and instead cite Florida law. At the end of their brief, Plaintiffs renew their request (which the Court already denied) that the Court "dismiss DHL's application for leave as improvidently granted." But nowhere in the brief do Plaintiffs explain why they believe leave was granted improvidently. DHL has addressed this issue twice already – in opposition to Plaintiffs' motion for reconsideration and in footnote 4 of DHL's opening brief on appeal. Plaintiffs still have not contended that Michigan law is any different from Florida law as to issues in this appeal, still have not retracted their prior statement to the Court that the laws are the same, and still have not addressed DHL's legal authorities that demonstrate why the Court can and should apply Michigan law. The short of the matter is that the lower courts erred on critical questions of breach of contract, damages, and summary disposition law that affect countless Michigan litigants.

II. Plaintiffs' New Summary Disposition Argument Supports DHL's Position

In every brief they filed previously on this issue in all three courts, Plaintiffs refused to offer any interpretation of the express limitations on DHL's service obligations contained in the second recital and Section 1 of the Reseller Agreement.

Now that the Court is deciding the case, Plaintiffs finally offer an interpretation of this contract language. They argue for the first time that it means Plaintiffs could not force DHL to add pickup locations and could not stop DHL from changing delivery destinations. Opp. Br. at 13. Plaintiffs claim that the "regularly services" condition in Section 1 means that they could not demand a pickup from DHL "at a particular location when there is already a DHL drop box nearby" and that DHL could "move a standard delivery location to a nearby address." *Id.* at 1.

This new interpretation cannot support the summary disposition ruling because it is not based on the words in the contract and, if anything, creates ambiguities. The terms "nearby" and "standard delivery location" are not in the contract, and nobody ever suggested they should be read into the contract until Plaintiffs filed their brief this month. It is not clear what these terms might mean. Does "nearby" mean a mile, 10 miles, or something else? What does it mean for a delivery location to be "standard"? The contract does not provide answers to these questions or others (for example, the contract does not mention "drop boxes"), and Plaintiffs do not provide answers. Of all the interpretations of the Reseller Agreement offered so far, Plaintiffs' new interpretation is the most convoluted and creates the most ambiguities.

In addition, Plaintiffs do not try to rebut DHL's argument that DHL's interpretation is the only commercially reasonable one. Plaintiffs concede that the Reseller Agreement is not a requirements contract and concede that Plaintiffs were not required to ship exclusively with DHL. If DHL was not obligated to satisfy Plaintiffs' requirements, and if Plaintiffs had no obligation to ship with DHL, then it makes no sense to interpret the contract as locking DHL into an entire domestic delivery network just for Plaintiffs' benefit.

Plaintiffs' interpretation even conflicts with the Court of Appeals' interpretation. The Court of Appeals held that DHL could "likely cease service to a handful of specific domestic

locations." But under Plaintiffs' interpretation, DHL could change every domestic location – not just a "handful" – as long as DHL "moved a standard delivery location to a nearby address."

Plaintiffs' new interpretation only demonstrates why Plaintiffs' summary disposition motion should not have been granted. The Court now has before it at least three different conflicting interpretations: (1) DHL's interpretation, which is explained in DHL's opening brief; (2) the Court of Appeals' "handful" interpretation; and (3) Plaintiffs' new interpretation.[1] DHL cited numerous authorities in its opening brief, which explain that when there is more than one reasonable interpretation of a contract, summary disposition is improper. Plaintiffs offered no response to these authorities. Instead, Plaintiffs cite three Florida cases. But Plaintiffs still point to no difference between Michigan and Florida law. Plaintiffs have not retracted what they told the Court last year – "Florida law is in complete accord" with Michigan breach of contract law. Opp. to App. for Leave at 11. The primary case Plaintiffs cite supports DHL's position. In *Dade County School Board v Radio State WQBA*, 731 So 2d 638, 643 (Fla 1999), the Florida Supreme Court reversed summary judgment because one word in the contract – "our" – was ambiguous.[2]

---

[1] Plaintiffs' only comment about DHL's interpretation is that it supposedly "conflicts" with DHL's counsel's statement that DHL still picks up and delivers packages at certain locations in the United States for international deliveries. Opp. Br. at 14. This is another new argument that is also wrong. DHL's interpretation of the contract has been consistent throughout the case. DHL was only required to pick up and deliver packages to and from domestic customer locations where DHL provided the service requested. That DHL continues to provide international shipping services at certain locations in the United States is irrelevant. Moreover, there is no evidence in the record about what DHL's international pickup and delivery locations are, how the international network differs from the domestic network, or whether any of Plaintiffs' customers tried to use DHL's post-January 30 network or were denied access to it.

[2] Not only does Michigan law apply to the substantive issues remaining in the case – as DHL noted in its opposition to Plaintiffs' motion for reconsideration – Michigan law always governs questions of procedure in Michigan courts. DHL's Opp. to Mot. for Reconsideration at 5-6; *see also* 1 Mich Pl & Prac § 1.6 (2d ed) ("It is well established that the law of the forum governs as to matters of procedure."). DHL's opening brief explained that the trial court and the Court of Appeals failed to follow Michigan summary disposition law governing breach of contract cases. Plaintiffs do not suggest that Florida law applies to summary disposition procedure, and

Plaintiffs' brief highlights the procedural error committed by the trial court and the Court of Appeals. Plaintiffs try to convince the Court that their new interpretation is correct, as if they were arguing facts at a trial. But this case was decided in Plaintiffs' favor at summary disposition. The issue is whether – interpreting all evidence in the light most favorable to DHL – Plaintiffs' new interpretation was the only reasonable one. Plaintiffs do not address this fundamental issue. The parties' briefs and the Court of Appeals' opinion demonstrate that at the very least there is an ambiguity in the contract that should have precluded summary disposition.

III. An Award Of Damages For January 2009 Based On Plaintiffs' New Theory Has No Support In The Record Or The Law

Plaintiffs have changed course entirely on the trial court's award of damages for January 2009, prior to the date of the alleged breach on January 31, 2009.[3] Until they filed their brief with the Court, Plaintiffs' argument was that the trial court did not award damages for January 2009. In the Court of Appeals, Plaintiffs claimed that although their expert calculated damages to TSS for all of 2009, he later "subtracted" some amount of "offset money." Supp. App'x at 601a n.7. Plaintiffs never argued that a court could award damages for January 2009. DHL explained that the "offset" argument was wrong, and the Court of Appeals did not adopt it. Plaintiffs now have abandoned this argument, and they concede for the first time that the trial court awarded damages for January 2009. Opp. Br. at 15.

Plaintiffs fail to respond to DHL's brief on this point. Even further afield, Plaintiffs cite to a Tenth Circuit decision in a case between a different reseller and involving a different contract. The contract in that case contained different terms and was not negotiated by DHL (it was negotiated by Airborne Express, which DHL later acquired).

[3] Although Plaintiffs make no distinction between their two entities in the damages sections of their brief, as DHL explained in its opening brief, the damages issues in this appeal relate only to The Service Source, Inc. ("TSS"), because only TSS was awarded lost profits.

Plaintiffs' new contention is that it was "appropriate to award damages for 2009." *Id.* Plaintiffs advance two new arguments in support of the award of January 2009 damages.[4]

Plaintiffs first argue that DHL breached the Reseller Agreement before January 31, 2009. They contend that "DHL cut off all domestic delivery services on December 10, 2008, for those Service Source customers who used DHL only irregularly in the preceding year." *Id.* Plaintiffs cite only page 40a of the Appendix, which is a November 10, 2008 letter from DHL to TSS. This argument cannot prevail both because Plaintiffs did not raise it below and because it is not supported by the record.

Until they filed their brief in this Court, Plaintiffs never argued that DHL breached the Reseller Agreement on December 10, 2008. Nor did the trial court ever mention this issue, much less rule that DHL breached on December 10. Obviously, this is not the time or place for Plaintiffs to raise new breach of contract theories. "Generally, a party may not remain silent in the trial court, only to prevail on an issue that was not called to the trial court's attention." *Walters v Nadell*, 481 Mich 377, 388; 751 NW2d 431 (2008). And this new theory contradicts what Plaintiffs told the Court last year when describing the breach: "the Circuit Court agreed that DHL's complete cessation of domestic shipping services was a breach of the clear and unambiguous contracts at issue." Opp. to App. for Leave at 2, 7. In addition, there is no evidence in the record that DHL actually stopped delivering any domestic packages on December 10. A court's review of a summary disposition ruling "is limited to the evidence that

[4] Plaintiffs are wrong on the standard of review. They argue that the trial court's "findings of fact," including its determination of damages, are entitled to "substantial deference" and may not be reversed unless "clearly erroneous." Opp. Br. at 10. DHL does not seek review of any findings of fact but instead seeks to correct the trial court's error of law in awarding TSS damages both before the alleged breach occurred and after the parties' contract terminated. As DHL explained, this Court reviews errors of law in the measurement of damages de novo. DHL Br. at 12 (citing cases). The trial court's errors of law are not entitled to any deference.

had been presented to the circuit court at the time the motion was decided." *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 475-76; 776 NW2d 398 (2009). The letter Plaintiffs cite states that as of November 10, it was "currently" DHL's "plan" to discontinue certain domestic deliveries as of December 10. The reason that Plaintiffs point to no evidence in the record that DHL ever carried out this plan is that DHL decided not to implement it. That was not put into the record either, but it would have been had Plaintiffs raised this argument. Plaintiffs cannot point to anything in the record showing that DHL breached the Reseller Agreement before January 31.

Plaintiffs next suggest that contract damages can be awarded for harm suffered before a breach. Plaintiffs do not address DHL's cited Michigan authorities. Instead, they cite *Capitol Envtl Services, Inc v Earth Tech, Inc*, 25 So 3d 593 (Fla Dist Ct App 2009). That case does not hold that pre-breach damages are proper, nor were such damages awarded. To the contrary, the court held that contract damages must be "causally related to the breach." *Id.* at 596. Again, Michigan and Florida law are identical on this issue. The Florida Supreme Court has held that "[d]amages for a breach of contract should be measured as of the date of the breach." *Grossman Holdings Ltd v Hourihan*, 414 So 2d 1037, 1040 (Fla 1982). DHL explained that this is Michigan and hornbook law. But clearly, lower courts and litigants need the Court's guidance.

IV. Plaintiffs' New Argument In Support Of Damages After March 5, 2009 Is One That Plaintiffs Expressly Waived In The Trial Court

In the Court of Appeals and in opposition to DHL's application for leave to appeal in this Court, Plaintiffs' entire argument about post March 5, 2009 damages was that DHL could not terminate the Reseller Agreement because DHL committed the first material breach. Supp. App'x at 617a n.12; Opp. to App. for Leave at 17-18 & n.7. Now, Plaintiffs have relegated this to their second argument, and they lead with a new argument.

Plaintiffs argue for the first time that DHL anticipatorily repudiated the Reseller Agreement on November 10, 2008, when it announced that it would end domestic shipping services after January 30, 2009. Opp. Br. at 16-17. As DHL explained at page 7, note 2 of its opening brief, Plaintiffs expressly waived the anticipatory breach argument in the trial court. In opposition to Plaintiffs' summary disposition motion, DHL explained that Plaintiffs could not prove an anticipatory breach. Supp. App'x at 451a-459a. In their reply brief, Plaintiffs responded that they were only claiming an actual breach, not an anticipatory breach. They called the doctrine of anticipatory breach "wholly irrelevant" because Plaintiffs sued after the time for performance arose. Supp. App'x at 466a. When DHL pressed the issue at oral argument, Plaintiffs' counsel stated: "Our complaint was filed in February, I think February 12, if I'm not mistaken, 2009, so there is no anticipatory breach or anything like that in this case." App'x at 310a. The trial court agreed with Plaintiffs' counsel, stating "I didn't see where any Plaintiff saw any anticipatory breach feature." App'x at 315a. Plaintiffs also did not argue anticipatory breach in the Court of Appeals.

Plaintiffs have chosen to ignore DHL's brief on this point and ignore what their counsel and the trial court said on the record. Plaintiffs cannot expressly waive a legal argument to gain an advantage in the trial court and then raise it for the first time in this Court. "[P]laintiff's position on appeal is untenable because it is contrary to the position [it] took in the lower court. A party may not take a position in the trial court and subsequently seek redress in an appellate court that is based on a position contrary to that taken in the trial court." *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 455 n1; 733 NW2d 766 (2006). If this case had been about anticipatory breach, DHL would have had much to say in opposition, but Plaintiffs chose a different course, one they cannot change now.

Plaintiffs' other argument, which is the only one they made earlier, is that DHL could not terminate the contract because DHL allegedly committed the first material breach. Plaintiffs previously cited several cases to support this argument. Supp. App'x at 617a n.12; Opp. to App. for Leave at 18 n.7. But they chose not to cite any of these cases in their merits brief. Plaintiffs now cite no law in support of their argument. As DHL has explained, the first material breach rule is inapplicable, both because DHL did not commit the first material breach and because TSS elected to keep the contract alive by shipping packages with DHL after DHL's alleged breach. DHL Br. at 30-31.

Plaintiffs respond in two ways. First, they attempt to move the date of DHL's alleged breach to an unspecified date earlier than January 31, 2009. But there is no support in the record for that, and it is contrary to the one consistent story Plaintiffs previously told this Court and the lower courts – that DHL breached when it completely ceased domestic shipping services after January 30. Supp. App'x at 462a, 465a, 589a, 595a; Opp. to App. for Leave at 8. The date of breach should not be argued for the first time in this Court.[5]

Second, Plaintiffs take issue with DHL's citation to *Schnepf v Thomas L McNamera, Inc*, 354 Mich 393; 93 NW2d 230 (1958). Plaintiffs argue that *Schnepf* only applies when a

[5] In another new argument, Plaintiffs suggest the trial court may have ruled that DHL breached the Reseller Agreement at some point before January 31, 2009. But they misquote the trial court transcript. In the transcript, the trial court stated that DHL breached the contract "when it unilaterally determined to ceased domestic package delivery service to Plaintiff." App'x at 409a. Plaintiffs change "ceased" to "cease." DHL ceased domestic shipping services on January 31, and the trial court did not find that DHL breached on a different date. DHL has cited clear statements by both the trial court and the Court of Appeals that the only alleged breach occurred on January 31. DHL Br. at 9, 11. Plaintiffs also told the Court of Appeals and this Court that the trial court ruled "DHL's complete cessation of domestic shipping services was a breach of the clear and unambiguous contracts at issue." Opp. to App. for Leave at 2, 7; Supp. App'x at 589a. Finally, the argument that DHL breached earlier is not tethered to the contract. The contract did not prohibit DHL from issuing a press release or sending a letter. Nor does the contract mention "service guarantees," which Plaintiffs refer to on page 5 of their brief. Plaintiffs cite no evidence that explains what a service guarantee is or how ending a guarantee could breach the contract.

breaching party has "notified" the non-breaching party that it intends to continue performance. *Schnepf* says nothing of the sort. *Schnepf* holds that unless the breaching party "indicate[s] an intention to repudiate the remainder of the contract, the injured party has a genuine election either of continuing performance or of ceasing to perform." *Id.* at 397. The record is clear that DHL did not "repudiate the remainder of the contract." DHL sent a letter to TSS on November 10, 2008, announcing its decision to cease domestic shipping after January 30, 2009, but explaining that DHL would "continue to provide international services" after that date. App'x at 40a. DHL never said it would stop providing international shipping services to TSS until TSS failed to pay for services rendered. *Schnepf* is clear that in this circumstance "[a]ny act" by the non-breaching party "indicating an intent to continue will operate as a conclusive election . . . depriving him of any excuse for ceasing performance on his own part." 354 Mich at 397. Plaintiffs cite no facts or law to rebut DHL's argument that TSS elected to continue with the contract. As DHL noted, TSS asked DHL if it could set up new customers after November 10, 2008, and TSS continued to take advantage of the Reseller Agreement by shipping packages under the contract even after January 30, 2009. DHL Br. at 6.[6] In addition, TSS could have terminated the Reseller Agreement under Section 17(b) if it believed that DHL was in default of its obligations prior to January 31. It elected not to do so and instead kept the contract alive.

DHL lawfully terminated the Reseller Agreement for non-payment under Section 17(c), and this precludes damages after March 9, 2009. DHL Br. at 26-29. Plaintiffs' only response is to raise the new argument that when TSS stopped paying DHL, it did not really "breach." This argument is both wrong and irrelevant. Plaintiffs cite no authority for the proposition that TSS

[6] Plaintiffs accuse DHL of not previously raising the argument that when TSS sought and obtained DHL's performance under the Reseller Agreement through early 2009, TSS continued to take advantage of the contract and thus was subject to termination for non-payment. DHL did raise this argument in both lower courts. Supp. App'x at 472a-475a, 481a, 555a-556a.

was entitled to free DHL shipments after November 10 and do not explain how that could be the law. Moreover, Plaintiffs expressly waived any argument that TSS did not breach the contract by failing to pay DHL when TSS conceded liability on DHL's counterclaim in full on the first day of trial. Supp. App'x at 470a-471a. But whether or when TSS breached is not relevant to the issue of whether DHL lawfully terminated the Reseller Agreement for non-payment. Plaintiffs do not dispute that DHL followed the procedure required by Section 17(c) of the Reseller Agreement to terminate it for non-payment. Section 17(c), unlike Section 17(b), does not hinge on whether a party breached the Reseller Agreement. The mere fact of non-payment alone – which Plaintiffs admit – triggered the termination provision. Once DHL terminated the agreement pursuant to its terms, TSS could no longer enjoy the benefits of the agreement or obtain damages for the loss of those benefits.[7] DHL stands by what it wrote about *Roll-Ice* and *Patel*, and what Plaintiffs say about these cases is not important. The law is that a party cannot obtain contract damages after a contract has been terminated. Plaintiffs do not challenge this statement of the law and cite no authority to the contrary.

V. Conclusion

Plaintiffs ignore the record, the cases, and the treatises DHL cited, as if ignoring them makes them go away. Read together, the lower courts' rulings and the parties' briefs show the need for the Court to act and set the courts and litigants on one path in breach of contract cases.

[7] Plaintiffs try to characterize the judgment against TSS as an "offset." It does not matter, for the reasons described above. But Plaintiffs are wrong. Although the judgment states that DHL must pay TSS an amount to be "offset" by the amount TSS owes DHL, this is simply a description of the math. At trial, counsel and the court made it clear on the record that TSS was liable to DHL on DHL's counterclaim and that if TSS were to recover nothing against DHL, DHL would collect the full amount of its counterclaim. Supp. App'x at 470a-471a.

Dated: September 24, 2014

COLLINS, EINHORN FARRELL P.C.

Noreen L Slank
NOREEN L. SLANK (P31964)
Collins Einhorn Farrell P.C.
Attorney for Defendant-Appellant
4000 Town Center, Ste. 909
Southfield, MI 48075
Tel.: (248) 355-4141

DECHERT LLP
Christopher S. Ruhland (pro hac vice)
Andrew S. Wong (pro hac vice)
Amy L. Rudd (pro hac vice)
Attorneys for Defendant-Appellant
633 West 5th Street, 37th Floor
Los Angeles, CA 90071
Tel.: (213) 808-5700